Habsan & Ors v Public Prosecutor

HIGH COURT (JOHOR BAHRU) — CRIMINAL APPEAL NO 42H-17 OF 2011
SAMSUDIN HASSAN JC
18 JANUARY 2012

Criminal Law — Penal Code — s 395 — Gang robbery unto vessel in Malaysian waters — Accused plead guilty — Sentenced of 12 months imprisonment with three strokes of rattan

Criminal Procedure — Appeal — Appeal against sentence — Whether to interfere with sentence — Whether sentence wrong in principal — Whether sentence manifestly excessive — Whether failure to apply correct principle

Criminal Procedure — Sentencing — Appeal against sentence — Gang robbery unto vessel in Malaysian waters — Whether sentence manifestly excessive — Accused plead guilty — Sentenced of 12 months imprisonment with three strokes of rattan — First time offender — Whether plea of guilt automatically warrants lighter sentence — Interest of public — Interest of nation — Repeated occurrence of gang robbery in Malaysian waters — Whether deterrent sentence required — Penal Code s 395

The appellants were charged under s 395 of the Penal Code for the offence of gang robbery unto the vessel MT Front Queen which was committed in Malaysian waters at about 3.2 nautical miles from Pulau Mungging, Kota Tinggi, Johor. The appellants pleaded guilty and were each sentenced to 12 months imprisonment from the date of arrest with three strokes of the rattan. The appellants appealed against the sentence.

Held, dismissing the appeal:

(1) The court hearing an appeal shall not disturb the sentence passed simply because the members of the court had passed a different sentence. Only when the sentence passed is wrong in principal, only then will the appeal court disturb the sentence passed. If the sentence passed is manifestly excessive or grossly inadequate, and when the appeal court is satisfied that there has been a failure to apply the correct principle, then only will the appellate court will interfere (see para 7); *Public Prosecutor v Loo Choon Fatt* [1976] 2 MLJ 256 referred; *Adam Atan v Public Prosecutor* [2009] 1 CLJ 33 referred.

(2) In passing sentence for the offence of committing gang robbery in Malaysian waters, the interest of the public must be the main consideration. Interest of the public in this case involved the interest of the nation which was the paramount consideration in passing sentence (see paras 10–11).

(3) The plea of guilt by the accused does not automatically warrant a lighter sentence towards him in the event that it is in conflict with the interest of the public (see para 14); *Chandra Sekaran a/l Ramiyah & Anor v Public Prosecutor* [2000] 3 MLJ 649 referred; *Public Prosecutor v Mohd Rashid Harun* [2000] 3 CLJ 832 referred.

(4) Being a first time offender is not the main consideration for the accused to receive lighter sentence (see para 15); *Public Prosecutor v Ooi Teng Chian* [2006] 1 MLJ 213 referred.

(5) The repeated occurrence of attempted gang robbery and also gang robbery that happens in the Malaysian waters especially in the South Region of Malaysia must be given serious consideration. The statistic shows that the trend is increasing over the years. To avoid the repetition of the same offence, the court must impose deterrent sentence (see paras 15–16).

[Bahasa Malaysia summary

Perayu-perayu dituduh di bawah s 395 Kanun Keseksaan untuk kesalahan rompakan berkumpulan ke atas kapal MT Front Queen yang mana dilakukan di perairan Malaysia pada kira-kira 3.2 batu nautika dari Pulau Mungging, Kota Tinggi, Johor. Perayu-perayu mengaku bersalah dan setiap seorang dihukum penjara 12 bulan dari tarikh penangkapan dengan tiga sebatan rotan. Perayu-perayu merayu terhadap hukuman.

Diputuskan, menolak rayuan:

(1) Mahkamah yang mendengar rayuan tidak akan campur tangan dengan hukuman yang dijatuhkan hanya kerana ahli-ahli mahkamah telah menjatuhkan hukuman berbeza. Hanya apabila hukuman yang dijatuhkan adalah salah dalam prinsipnya, barulah mahkamah rayuan akan campur tangan dengan hukuman yang dijatuhkan. Jika hukuman yang dijatuhkan adalah berlebihan atau tidak mencukupi, dan apabila mahkamah rayuan berpuashati bahawa terdapat kegagalan untuk menggunapakai prinsip yang betul, barulah mahkamah rayuan akan campur tangan (lihat perenggan 7); *Public Prosecutor v Loo Choon Fatt* [1976] 2 MLJ 256 dirujuk; *Adam Atan v Public Prosecutor* [2009] 1 CLJ 33 dirujuk.

(2) Dalam menjatuhkan hukuman untuk kesalahan melakukan rompakan berkumpulan di perairan Malaysia, kepentingan awam mesti menjadi

pertimbangan utama. Kepentingan awam dalam kes ini melibatkan kepentingan negara yang mana adalah pertimbangan penting dalam menjatuhkan hukuman (lihat perenggan 10–11).

(3) Pengakuan bersalah oleh tertuduh bukan dengan automatik mewajarkan hukuman lebih ringan terhadapnya jika ia konflik dengan kepentingan awam (lihat perenggan 14); *Chandra Sekaran a/l Ramiyah & Anor v Public Prosecutor* [2000] 3 MLJ 649 dirujuk; *Public Prosecutor v Mohd Rashid Harun* [2000] 3 CLJ 832 dirujuk.

(4) Sebagai pesalah pada kali pertama bukan pertimbangan utama untuk tertuduh menerima hukuman lebih ringan (lihat perenggan 15); *Public Prosecutor v Ooi Teng Chian* [2006] 1 MLJ 213 dirujuk.

(5) Kejadian berulang percubaan rompakan berkumpulan dan juga rompakan berkumpulan yang berlaku di perairan Malaysia terutamanya di Bahagian Selatan Malaysia mesti diberikan pertimbangan yang serius. Statistik menunjukkan bahawa trend meningkat sejak beberapa tahun ini. Untuk mengelak pengulangan kesalahan yang sama, mahkamah mesti mengenakan hukuman berat (lihat perenggan 15–16).]

Notes

For cases on appeal against sentence, see 5(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 225–235.

For cases on appeal against sentence, see 5(2) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 3702–3770.

For cases on s 395 of the Penal Code, see 4(2) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 2146–2150.

Cases referred to

Adam Atan v PP [2009] 1 CLJ 33, CA (refd)

Chandra Sekaran a/l Ramiyah & Anor v PP [2000] 3 MLJ 649; [2000] 3 CLJ 293, CA (refd)

PP v Leo Say & Ors [1985] 2 CLJ 155, HC (refd)

PP v Loo Choon Fatt [1976] 2 MLJ 256 (refd)

PP v Mohd Rashid Harun [2000] 3 CLJ 832, HC (refd)

PP v Ooi Teng Chian [2006] 1 MLJ 213; [2005] 4 CLJ 557, CA (refd)

R v Ball (1951) 35 Cr App Rep 164, CA (refd)

Legislation referred to

Penal Code s 395

Ali (Prison Director, Kluang Prison Department, Johor) for the appellants.

Mirza bt Mohamed (Erda with her) (Deputy Public Prosecutor, Malaysian Maritime Enforcement Agency) for the respondent.

Samsudin Hassan JC:

INTRODUCTION

[1] The appellants were charged under s 395 of the Penal Code for the offence of gang robbery unto the vessel MT Front Queen which was committed in Malaysian waters at about 3.2 nautical miles from Pulau Mungging, Kota Tinggi, Johor.

[2] The appellants pleaded guilty and understood the nature and consequences of the plea without any reservation. Their plea were then accepted by the learned Sessions Court judge of Kota Tinggi and the appellants were later convicted. The appellants were each sentenced to 12 months imprisonment from the date of arrest (9 March 2011) and three strokes of the rattan. This appeal is against the sentence given.

THE CHARGE

[3] The charge is as follow:

> Bahawa kamu bersama pada 9 Mac 2011 jam lebih kurang 3.00 pagi di atas Vessel MT Front Queen (IMO No: 9384605) di kedudukan Garis Lintang 01 darjah 19.278 minit Utara dan Garis Bujur 104 darjah 15.512 minit Timur di dalam perairan Malaysia pada jarak lebih kurang 3.2 batu nautika dari Pulau Mungging Kota Tinggi, Johor, didapati telah cuba melakukan rompak berkumpulan ke atas Vessel MT Front Queen, dan dengan itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah Seksyen 395 Kanun Keseksaan.

THE FACTS OF THE CASE

[4] The facts was read and tendered as exh P1 and accordingly accepted by the appellants.

[5] So as other exhibits which has been tendered accordingly as P2 until P25.

APPEAL AGAINST SENTENCE

[6] During the hearing of this appeal, this court has considered the mitigation put forward by the appellants against the sentence passed by the trial judge in the sessions court. This court finds no wrong whatsoever with regards to the sentencing principle applied by the learned trial judge.

[7] It is the principle of law with regards to the mitigation of the sentence; the

court hearing the appeal will and shall not disturb the sentence passed simply because the members of the court had passed a different sentence. The trial judge had seen the accused and heard their history herself. Only when the sentence passed was wrong in principal, then only the appeal court will disturb the sentence passed. If the sentence passed was manifestly excessive or grossly inadequate, and when the appeal court is satisfied that there has been a failure to apply the correct principle, then only will the appellate court will interfere (see case *R v Ball* (1951) 35 Cr App Rep 164 and *Public Prosecutor v Loo Choon Fatt* [1976] 2 MLJ 256).

[8] In the case of *Adam Atan v Public Prosecutor* [2009] 1 CLJ 33, Gopal Sri Ram J stated at p 36:

> [6] in an appeal against sentence, the initial function of this court is one of review only. The fact that each of us sitting separately or together would have imposed a lesser sentence is irrelevant. The appellant must satisfy this court that the sentencing court has either erred in principle or imposed a sentence that manifestly excessive. We find it unnecessary to cite any authority in support of this well established principle.

ASSESSMENT ON THE SENTENCE PASSED BY THE LEARNED SESSIONS COURT JUDGE

[9] This court agrees with the learned trial judge that in passing sentence towards the appellants for the offence of committing gang-robbery in Malaysia waters, the interest of the public must be the main consideration.

[10] Interest of the public in this case involves the interest of the nation which is the paramount consideration in passing sentence. This principle has been the guidance in the courts of Malaya in passing the appropriate sentence.

[11] In the grounds of judgment sets out by the court below, it is clear that the interest of the public has formed the main consideration by the court in passing the sentence.

[12] As in the case of *Public Prosecutor v Loo Choon Fatt* [1976] 2 MLJ 256 and *Public Prosecutor v Leo Say & Ors* [1985] 2 CLJ 155, it is clear that public interest outweighed the interest of the accused. It is also has been stressed upon that punishment in a deterrent forms must be given in order to reflect the stand of the court in deterring the offence.

[13] Section 395 of the Penal Code allows for term of imprisonment up to 20 years and also liable for whipping in the event that the accused is convicted

upon the charge preferred against him. This section clearly indicates how serious the offence of robbery is and the court should impose an appropriate sentence to the guilty accused.

[14] It is to be reminded that the plea of guilt by the accused is not automatically warrant a lighter sentence towards him in the event that it is in conflict with the interest of the public, (see *Chandra Sekaran a/l Ramiyah & Anor v Public Prosecutor* [2000] 3 MLJ 649; [2000] 3 CLJ 293 and *Public Prosecutor v Mohd Rashid Harun* [2000] 3 CLJ 832).

[15] Another case that portray where first time offender is not the main consideration for the accused to receive lighter sentence, (see *Public Prosecutor v Ooi Teng Chian* [2006] 1 MLJ 213; [2005] 4 CLJ 557). The repeated occurrence of attempted gang robbery and also gang robbery that happens in the Malaysian waters especially in the South Region of Malaysia must be given serious consideration by this court. The statistic shows that the trend is increasing over the years.

[16] To avoid the repetition of the same offence, the trial court must impose for deterrent sentence to the convicted person.

[17] Most of the case that happens in the South Region of Malaysia involves vessels registered outside Malaysia.

[18] Therefore, the stand of this court is in line with the decision made by the trial court where it is important to stress the rigidity of the domestic law through the passing of the sentence in order to give assurance to the foreign vessels to operate in Malaysia safely. From this also, the sovereignty of our country can be maintained. The safe environment in Malaysian waters will ensure the confidence of foreign vessels to trade in our country. Indirectly, this will boost the economy of this country. If this problem (robbery or attempted robbery) is left out without control, it will give a bad impact to the nation.

CONCLUSION

[19] The court has made an extensive evaluation based on the mitigating factors that has been put forward and in doing so, the court has also take into consideration the aggravating factors put forward by the respondent and therefore, this court finds no errors in the grounds of judgment made by the

sessions court judge. This court sees no reason to upset the decision made therefore, the appellants' appeals are accordingly dismissed and the decision of the learned trial judge affirmed.

Appeal dismissed.

Reported by Kanesh Sundrum